

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

James R. Strong, #198044,)
) C/A No. 2:08-3133-MBS
Plaintiff,)
)
vs.)
)
Jon Ozmint, SC Dept. Of Corrections;)
Bernard McKie, Kirkland Warden;)
Michael Joseph, Prison Guard; Gary Lane,)
Prison Guard and Captain; Kim Hill, Prison)
Guard and Grievance Coordinator;)
James Sleigh, Prison Guard; Robert Ward,)
Deputy Director of SCDC; NFN Joyner,)
a Deputy Warden; Linda J. Dunlap,)
SCDC Nurse Practitioner; Eileen Delaney)
Weiler, SCDC Nurse Practitioner; Larry)
Kong, American Amenities, Inc.,)
)
Defendants.)
_____)

ORDER

Plaintiff James R. Strong is an inmate in custody of the South Carolina Department of Corrections (SCDC). At the time of the underlying events, Plaintiff was incarcerated in the Maximum Security Unit of the Kirkland Correctional Institution in Columbia, South Carolina. Plaintiff filed the within complaint on September 16, 2008, alleging that his constitutional rights have been violated in various respects. Plaintiff brings this action pursuant to 42 U.S.C. § 1983.

It appears that counsel for SCDC accepted service on behalf of those Defendants who are current employees of SCDC, but declined to accept service on behalf of Defendants Joseph and Weiler. According to the Marshal's unexecuted returns, counsel declined to accept service on behalf of Defendant Joseph because he no longer was employed by SCDC. As to Defendant Weiler, counsel could not identify any such person as being employed by SCDC.

On April 3, 2009, Plaintiff filed a motion to extend time to serve Defendants Joseph and Weiler (Entry 37). Plaintiff asserted that Defendant Joseph had been terminated for assaulting Plaintiff. Plaintiff further asserted that the correct name of Defendant Weiler is Eileen Wyler Delaney, not Eileen Delaney Weiler, and that she is a nurse practitioner at SCDC. Defendants Ozmint, McKie, Lane, Hill, Sleight, Ward, Joyner, and Dunlap filed a response in opposition to Plaintiff's motion on April 21, 2009.

In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02, D.S.C., the within action was referred to United States Magistrate Judge Robert S. Carr for pretrial handling. On August 5, 2009, the Magistrate Judge issued a Report and Recommendation in which he recommended that Defendants Joseph and Weiler be dismissed pursuant to Fed. R. Civ. P. 4(m), which provides, in pertinent part:

If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Plaintiff filed objections to the Magistrate Judge's order on August 24, 2009. Plaintiff contends, among other things, that the Magistrate Judge erred in finding his motion to be untimely under Rule 4(m). The court disagrees. Plaintiff's motion for an order directing service was not filed until April 3, 2009, nearly three months after Plaintiff became aware that service had not been perfected on Defendants Joseph and Weiler, and nearly nine months after the complaint was filed. Plaintiff does not provide justification for the delay. Accordingly, the court adopts the Report and Recommendation and incorporates it herein by reference. Defendants Joseph and Weiler are

dismissed without prejudice pursuant to Rule 4(m).

IT IS SO ORDERED.

/s/ Margaret B. Seymour
United States District Judge

Columbia, South Carolina

September 30, 2009

NOTICE OF RIGHT TO APPEAL

Plaintiff is hereby notified that he has the right to appeal this order pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.